No. 78-548

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY ARROYO AND FRANK SANCHEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT J. ERICKSON
FRANK J. MARINE
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-548

ANTHONY ARROYO AND FRANK SANCHEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 581 F. 2d 649.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1978. A petition for rehearing was denied on September 5, 1978 (Pet. App. 20a). The petition for a writ of certiorari was filed on September 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 18 U.S.C. 201(c)(1) prohibits public officials from soliciting and receiving funds in exchange for official

acts, where those acts have already been performed but the person who is the subject of the solicitation does not know it.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners Arroyo and Sanchez were convicted of conspiracy to solicit and to receive a bribe, in violation of 18 U.S.C. 371. Petitioner Arroyo also was convicted of soliciting and receiving a bribe, in violation of 18 U.S.C. 201(c)(1). Petitioner Arroyo was sentenced to concurrent terms of 18 months' imprisonment on each count. Petitioner Sanchez was sentenced to 15 months' imprisonment. A divided panel of the court of appeals affirmed (Pet. App. 1a-19a).

The evidence showed that petitioner Arroyo was a loan officer in the Chicago office of the Small Business Administration (SBA). Petitioner Sanchez was a loan consultant with the Chicago Economic Development Corporation, a federally funded corporation that assists small businessmen in obtaining SBA guaranteed loans through local banks.

In May 1975, Orlando Fernandez Galindo (Fernandez) applied to the First National Bank of Chicago for a $35,000 loan. The bank in turn applied to SBA for a 90% guarantee (Pet. App. 3a). Arroyo received the application on August 19, 1975. After reviewing Fernandez's creditworthiness, Arroyo recommended to his supervisor that the loan receive an SBA guarantee. The guarantee was authorized on August 26, 1975, but Fernandez was not informed at that time that his loan had been approved (*ibid.*).

On August 27, 1975, Fernandez went to Sanchez to inquire whether the bank had approved his loan application. Sanchez responded that the bank would not issue the loan without SBA authorization and that

Arroyo was the only person who could help Fernandez obtain the necessary SBA guarantee (Pet. App. 3a). Sanchez arranged a meeting between Fernandez and Arroyo for the following day. At that meeting, Arroyo stated that Fernandez "did not have any problems" because he, Arroyo, had the loan application. When Fernandez asked if the SBA guarantee would cost him anything, Arroyo told him to see Sanchez the next day (Pet. App. 4a). Arroyo did not tell Fernandez that the loan application had already received SBA authorization.

On August 29, 1975, Fernandez told Sanchez about his conversation with Arroyo the previous evening. Sanchez asked Fernandez the amount of the loan. Fernandez stated that he wanted to borrow $35,000. He then asked how much the loan would cost. Sanchez replied that "some of the people had paid different amounts"; Sanchez then mentioned a specific amount to Fernandez (Pet. App. 4a). Two or three days later, the bank told Fernandez that the SBA had authorized only a $5,000 loan (*ibid.*).

In December 1975, Sanchez asked Fernandez whether he had paid $800 to Arroyo. Fernandez said that he had not paid "because of problems in getting the loan proceeds" (Pet. App. 4a). Sanchez replied that it would be better if Fernandez paid the $800. SBA records indicate that in January and February 1976, Fernandez received total loan disbursements of $30,000 (*ibid.*).

On March 15, 1976, Sanchez told Fernandez that Arroyo wanted to speak with him about the money and to "collect 'the eight' " (Pet. App. 4a). Shortly thereafter, Arroyo telephone Fernandez and said that he would meet with Fernandez the next day "to pick up the money" (*ibid.*). At that meeting, Arroyo said that Fernandez should pay him $800, but Fernandez replied that he could only pay $500 and might, in fact, need an additional loan (Pet. App. 5a). Arroyo took the $500 and stated that

if Fernandez wanted additional money, he should have Sanchez prepare another loan application. Arroyo was arrested as he left the meeting.

ARGUMENT

Petitioners contend (Pet. 7-15) that they did not violate 18 U.S.C. 201(c)(1) by soliciting money from Fernandez after petitioner Arroyo had already made his recommendation concerning the SBA loan guarantee. They assert (Pet. 10) that Section 201(c)(1) was intended to prevent official decisions made as the result of corrupt influence; accordingly, in their view, the statute does not embrace solicitations by public officials who have already exhausted their power of decision regarding particular acts.[1] Petitioners argue that because the SBA loan guarantee was authorized on August 26, 1975, funds solicited or received after that date could not have influenced Arroyo's action. Petitioners therefore contend that the conduct proved at trial cannot support a bribery conviction and that the district court erred in refusing to charge the jury that Section 201(c)(1) does not apply to "post-decision" solicitations.[2]

---

[1]In petitioners' view, such "post-decision" solicitations are covered only by 18 U.S.C. 201(g), which proscribes the solicitation of money by a public official "for or because of any official act performed or to be performed by him."

[2]Petitioners requested the following instruction (Pet. App. 7a):

> If you believe that the defendants' requests for or solicitation of the gratuity were not made until after the employee had exhausted his power of decision or action in connection with the loan and were not made under any prior promise or understanding that a gratuity would be forthcoming, then the defendants' actions did not constitute a transgression and you must find them not guilty.

The argument is without merit. This Court had occasion to discuss the meaning of Section 201(c)(1) in *Brewster* v. *United States*, 408 U.S. 501 (1972). The Court there stated (*id.* at 526-527):

> The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that [the public official] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.
>
> * * * * *
>
> * * * To make a prima facie case under this indictment, the Government need not show any act of [an official] subsequent to the corrupt promise for payment, for it is *taking* the bribe, not performance of the illicit compact, that is a criminal act.

Brewster thus makes clear that an official's conduct after taking a bribe is immaterial to his guilt under Section 201(c)(1). The gravamen of the bribery offense is the solicitation and receipt of something of value in exchange for a promise, express or implied, that the official will act in a certain way. Whether the official actually does act in that way or whether he has already acted in that way is irrelevant. The critical feature, as the court of appeals in this case noted (Pet. App. 11a-12a & n.10), is "what the payer believes he is paying for." See also *United States* v. *Arthur*, 544 F. 2d 730, 734 (4th Cir. 1976); *United States* v. *Brewster*, 506 F. 2d 62, 72 (D.C. Cir. 1975) (on remand).

The evidence presented at trial amply supported petitioners' convictions. Although SBA authorization had already been granted, petitioners misled Fernandez into believing that Arroyo had not yet acted on the loan application (Pet. App. 9a). Petitioners then solicited money in exchange for a promise, albeit a false one, that

Arroyo's official action would be influenced by the payment of $800. This conduct falls squarely within the bribery provisions of Section 201(c)(1). The district court stated the law correctly when it instructed the jury that a conviction under Section 201(c)(1) requires "that the public official solicit or receive the money on the representation that the money is for the purpose of influencing his performance of some official act" (Pet. App. 6a). Accord, *Whitney* v. *United States*, 99 F. 2d 327, 331 (10th Cir. 1938). See also *United States* v. *Troop*, 235 F. 2d 123 (7th Cir. 1956); *Kemler* v. *United States*, 133 F. 2d 235 (1st Cir. 1942) (both cited with approval by the court of appeals in this case, Pet. App. 12a n.12).

Petitioners (Pet. 7) and the dissenting opinion (Pet. App. 18a-19a) suggest that the decision of the court of appeals conflicts with the decisions in *Woelfel* v. *United States*, 237 F. 2d 484, 488 (4th Cir. 1956), and *United States* v. *Brewster*, *supra*, 506 F. 2d at 80, 82. We disagree. *Woelfel* involved the construction of a markedly different statute, the former 18 U.S.C. (1952 ed.) 202, which prohibited any public official from soliciting money "with intent to have his decision or action" on any matter "brought before him in his official capacity * * * influenced thereby" (237 F. 2d at 485). By contrast, the present Section 201(c)(1) does not require proof that the public official intended to have his official action influenced. Moreover, as the court of appeals observed (Pet. App. 13a-14a), the person solicited by the public official in *Woelfel* knew that the official act had been completed and was not misled into believing that the money was being solicited in exchange for a promise that the official's conduct would be influenced. Similarly, *Brewster* "did not involve a misrepresentation that a past official act was *in futuro*" and could be influenced by the payment of a bribe (Pet. App. 15a).

The court of appeals' opinion in *Brewster* supports the view expressed by the court of appeals in this case (Pet. App. 15a-16a) that the distinction between solicitation of a bribe, in violation of 18 U.S.C. 201(c)(1), and solicitation of a gratuity, in violation of 18 U.S.C. 201(g), lies in the different intent underlying each offense, not, as petitioners argue (Pet. 10-11), in the temporal relationship between the request for funds and the performance of an official act.[3] Proof of an offense under Section 201(c)(1) requires proof of a corrupt agreement to act in a certain way in exchange for something of value. Proof of an offense under Section 201(g) does not require evidence of a corrupt intent to enter into such a bargain. See, *e.g.*, *United States* v. *Arthur*, *supra*, 544 F. 2d at 734; *United States* v. *Brewster*, *supra*, 506 F. 2d at 72. To sustain a conviction for solicitation of a gratuity, "it is necessary [only] to show that [a public official] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act." *United States* v. *Brewster*, *supra*, 408 U.S. at 527. Here the evidence showed that petitioners deliberately conveyed to Fernandez the impression that payment of $500 would result in favorable action by Arroyo on the loan application. No more was needed to sustain the convictions under Section 201(c)(1).

---

[3]Indeed, 18 U.S.C. 201(g) expressly applies to gratuities for official acts "performed or *to be performed*" by a public official (emphasis added). The statute thus covers not only past but future acts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT J. ERICKSON
FRANK J. MARINE
Attorneys

NOVEMBER 1978

DOJ-1978-11